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HAROLD B. WILLEY, C

In the Supreme Court

of the United States

OCTOBER TERM, 1954

No. 486

LAVEDA NOONAN,

Petitioner

vs.

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Respondent

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The question presented for review as stated by petitioner in her petition is not a correct statement of the question. The question presented for review is whether there is any ambiguity in the suicide clause of the policy of insurance in

question, which provides for a limited amount of insurance in the event of suicide within one year from the date of issue of the policy, where other provisions of the policy provide that the policy shall be deemed to be in effect for certain purposes from one date, and the testimonium clause specifically designates another date as its date of issue.

STATEMENT OF THE CASE

The policy in the instant case was issued on June 22, 1951, pursuant to a written application dated June 15, 1951. The insured in his application specified that the policy should be written to take effect "as of 3-14-51". The application provided that if the applicant should pay the agent the amount indicated on the application and the company should receive satisfactory evidence that at the time of the completion of the application the insured was an acceptable risk for the policy at the company's published premium rates therefor, the policy as applied for should be deemed to be in effect as from the date specified.

There was no reference to suicide in the application. However, the policy, when issued contained a provision to the effect that, in the event of suicide within one year from the date of issue of the policy, the insurance under the policy should be a sum equal to the premiums which had been paid to and received by the company and no more.

The policy contained a provision that "the anniversaries, and insurance years of this policy shall be determined from

March 14, 1951, the date as of which this policy shall be deemed to take effect". This was in conformity with the application. Following the foregoing provision and immediately preceding the signature of the company's authorized officers appears this clause:

> "In Witness Whereof, the New York Life Insurance Company has caused this policy to be executed on June 22, 1951, which *is its date of issue.*" (emphasis supplied)

The insured committed suicide on May 23, 1952. Appellant, the beneficiary, submitted proof of death to the company on June 15, 1952. On June 18, 1952, respondent tendered to the appellant a sum equal to the premiums paid, plus interest from the date of death until June 18, 1952. This tender was rejected and this action was commenced by petitioner to recover the face amount of the policy. Respondent tendered into the court for the benefit of petitioner the amount of its previous tender.

The trial court expressed the opinion that the language of the application conflicted with the language of the policy and gave judgment for the petitioner. The Court of Appeals, however, held that no conflict or ambiguity existed; that clearly the policy was in effect from March 14, 1951, for every purpose except the suicide and incontestability provisions; that the latter are on their face governed by "the date of issue" which was specifically stated in the policy to be June 22, 1951. The Court of Appeals therefore reversed the decision of the trial court.

ARGUMENT

I. There is No Conflict with Decision of Another Court of Appeals.

The decision of the Court of Appeals for the Ninth Circuit is not in conflict with the decision of another court of appeals. The cases cited by petitioner do not reflect such a conflict. *Prudential Insurance Company of America vs. King*, 101 F. (2d) 990 involved a question as to the effective date of a policy where the application contained two different dates. The question for determination was whether the policy was in effect on the date of death of the insured. The case of *Pacific Mutual Life Insurance Company of California vs. Barton*, 50 F. (2d) 362, involved a question as to whether two policies of insurance were in force at the time of the insured's death and turned on the question of the authority of the soliciting agent. In neither of these cases is the question of suicide involved, nor do they involve the question of the date of issue of a policy.

The decision of the Court of Appeals for the Ninth Circuit in the instant case is in conformity with the decision of the Court of Appeals for the Fifth Circuit in the case of *Crowley v. Travelers Insurance Co.*, 196 F. (2d) 315. In that case the policy contained provisions similar to those in the instant case. There the Court held that there was no conflict nor ambiguity in the suicide provisions of the application and the policy; that in both provisions the issue date is named as controlling; and that this being so, the rule of more favorable

construction in favor of assured invoked by appellant is without application.

The decision is also in conformity with the decision of the Court of Appeals for the Fourth Circuit in the case of *Davis v. Fidelity Mutual Life Insurance Co.* 107 F. (2d) 150. The policy in that case likewise contained provisions similar to the policy in the instant case and the court held that there was no ambiguity and that "the policy expressly states that the 27th day of March, 1936, is the 'date of issue' and while February 27, 1936, is fixed in the policy for certain purposes, this was done at the request of the insured and was for his benefit. These purposes are expressly stated and the earlier date was to be used as the anniversary date for the payment of premiums, loan provisions, non-forfeiture provisions and the apportionment of dividends. . . . Having contracted that the 'date of issue' was March 27, 1936, the death of the insured by his own hand on March 16, 1938, brought into force this clause." This case also held that insurance companies have a right to make a lawful contract and have that contract enforced, and that the insured, when he accepts the policy, is charged with the knowledge of its provisions. This is an answer to the argument made by petitioner that perhaps the insured was wholly at the mercy of the company as to what it might place in the policy. If the contract when received did not conform to his application, it was the duty of the insured to refuse to accept it or be bound by its terms.

II. There is No Conflict with Prior Decision of Court of Appeals for Ninth Circuit.

The decision in *Schwartz vs. Northern Life Insurance Company*, 25 F. (2d) 555, (CCA 9th Cir.) is not in conflict with the decision in the instant case. It is true that the Schwartz case involves the question of suicide and whether or not the insured committed suicide within the period prescribed by the suicide clause of the policy. However, the application in that case contained a provision that the insurance should be void, except for the amount of the premiums paid therefor, in the event that the insured committed suicide within one year "from date policy becomes effective." The question there was what was the effective date of the policy and not the date of issue of the policy as in the instant case. Neither did the policy in that case contain a provision specifically designating the effective date of the policy.

III. There is No Conflict with Prior Decision of This Court.

The decision in the instant case is not in conflict with the decision of this court in *Mutual Life Insurance Company of New York vs. Hurni Packing Company*, 263 U. S. 167, 44 S. Ct. 90, 68 L. Ed. 235, 31 ALR 102. In the Hurni Packing Company case the application requested that the policy be dated August 23, 1915. The testimonium clause in the policy read:

> "In witness whereof, the company has caused this policy to be executed this 23rd day of August, 1915."

The policy contained a provision that it would be incontestable except for non-payment of premiums provided two years shall have elapsed from its date of issue. The policy was applied for on September 2, 1915, and was delivered about September 13, 1915. The question before the Court was the date of issue of the policy. There was no provision in the policy specifically fixing the date of issue as in the instant case. In the Hurni Packing Company case, the court held that the date in the testimonium clause was the date of issue. In the instant case, the Court of Appeals also held that the date in the testimonium clause was the date of issue, particularly because the clause so designated that date as the date of issue.

IV. Public Importance of Decision.

It is recognized that the amount of insurance in force in this country is of importance. However, the precise question presented by the Petition in the instant case is not of sufficient public importance as would warrant this court to accept jurisdiction.

CONCLUSION

There has been no showing by petitioner that there is any conflict between the decision in the instant case and the decision of another court of appeals or of this court on the same matter. Neither is there any showing that the decision is in conflict with the decision of the courts of the

State of Oregon where the policy was delivered. As held by the Court of Appeals, there was no conflict or ambiguity in the policy. The date of issue was specifically stated in the policy in such a manner as to leave no doubt as to the date of issue. The Petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,

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